

GOVERNMENT RECORDS COUNCIL
October 9, 2003 PUBLIC MEETING – OPEN SESSION

The meeting was called to order at 9:30 a.m. at the Department of Community Affairs, Room 235A, Trenton, New Jersey. The Open Public Meetings Act statement was read.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs), Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education)

Mr. Maltese read a resolution to convene in closed session to receive legal advice concerning the complaints to be adjudicated that day. Ms. Hook moved to adopt the resolution that was seconded by Mr. Spigner. All members present approved the motion. The Council met in closed session from 9:35 to 10:40 a.m.

The Council reconvened in open session at 10:45 a.m. in Room 129 of the Department of Community Affairs, Trenton, New Jersey. The Open Public Meetings Act statement was read and attendees recited the Pledge of Allegiance.

Mr. Dice called the roll:

Present: Chairman Vincent Maltese, Joe Monzo (designee of Commissioner Susan Bass Levin, Department of Community Affairs), Virginia Hook, Bernard Spigner, and Diane Schonyers, (designee of Commissioner William Librera, Department of Education)

Also Present: Deputy Attorney General Barbara Conklin, Acting Executive Director Paul Dice and Staff Associates Chris Malloy and Donna Siminski.

Mr. Maltese discussed Mr. Pfeiffer's stepping down as the Acting Executive Director of the Government Records Council. Mr. Spigner made a motion to appoint Mr. Dice as the Acting Executive Director, seconded by Ms. Hook.

Ayes: Ms. Hook, Mr. Monzo, Ms. Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Mr. Maltese asked Mr. Dice to review personnel matters. Mr. Dice discussed the additional staff that was hired as well as the resignation of a staff member.

Mr. Maltese called for the adoption of minutes from the public meeting of September 11, 2003. Mr. Spigner moved to adopt the minutes as prepared with a second by Ms. Hook. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms. Schonyers, Mr. Spigner, and Mr. Maltese.

Nays: None

Abstention: Mr. Monzo

Mr. Maltese called for the adoption and release to the public of the closed session minutes from September 11, 2003. Ms. Schonyers asked that the minutes be amended to reflect her attendance. A motion to accept the minutes with amendments was made by Ms. Schoyners and seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Ms Schonyers, Mr. Spigner and Mr. Maltese.

Nays: None

Abstention: Mr. Monzo

Mr. Maltese called for the Executive Director's report. Mr. Dice distributed a copy of the report to the Council and stated that copies are available for public inspection.

Mr. Maltese addressed the issue of "knowing and willful" as contained in OPRA as well as attorney and custodian penalties. The Council had asked the Division of Law to provide the GRC with advice in connection with the phrase, knowing and willfully.

Deputy Attorney General, Barbara Conklin reviewed her advice to the Council. She stated that "willful" constitutes an intentional act, which is committed with the knowledge that the act is contrary to the requirements of OPRA. If the Council believes in any case that the facts on the record as written, might constitute a knowing and willful violation, and unreasonable under the totality of the circumstances, then the Council should have a hearing to allow the custodian and anyone else with relevant knowledge an opportunity to present their case. After the hearing the Council may interpret the facts and apply the record to the legal standard that the Division of Law has provided.

A conversation then ensued.

Mr. Maltese addressed the Council:

"As you just heard from DAG Conklin, the DOL advises this Council that the phrase "knowingly and willfully" means "an intentional act which is committed with knowledge that the act is contrary to the requirements of the statute". To the best of my knowledge, the standard concerning violations considered to be "knowing and willful in the civil context, has not been specifically addressed by our Courts although our courts have addressed the concept of "willful misconduct" as pointed out by the DOL, and it is as a

result of those cases that the DOL concludes that the definition of “willful and knowing” is equivalent to the definition of “willful misconduct”, meaning an intentional act which is committed with knowledge that it is contrary to the requirements of law. The DOL further advises that before the GRC can impose a fine on a public official, officer, custodian or employee, which I will collectively refer to as “officials”, the question of whether the official’s conduct is “knowing and willful” must be based on facts which must be determined in a plenary hearing conducted pursuant to the New Jersey Administrative Procedures Act N.J.S.A. 52:14B-1.

The issue before us today is whether the Council is required in each case where it is inclined to impose a fine pursuant to N.J.S.A. 47:1A-11a, to first conduct a hearing to determine whether an official “willfully and knowingly” intended to violate OPRA. The DOL has concluded that such a hearing is required in such cases. I respectfully disagree with that conclusion. Although I agree that a hearing to determine the official’s intent in denying a document request is appropriate in those instances where the statutory mandate is unclear or reasonably susceptible to different interpretations, I do not agree, absent mitigating circumstances, that such a hearing is required where an official violates a clear, plain explicit or unambiguous provision or mandate of the statute. For example, I do not believe a “specific intent” hearing is warranted if an official denies a request for a copy of a specific voucher pursuant to 47:1A-5e, or if an official never responds to a records request or fails to respond to a records request within the time period established in subsection (i) of that section, or if an official charges a requestor \$15 for a one page copy of a meeting agenda in violation of 47:1A-5b. Where the statutory mandate is clear, unambiguous, explicit and plain on its face it is my view that, absent mitigating circumstances, a “specific intent” hearing is not required as a condition precedent to the imposition of a fine on the offending official under 47:1A-11a.

The DOL’s advise relies in part on a New Jersey Supreme Court case entitled *Fielder v. Stonack, 141 N.J. 101 (1995)* to support the proposition that there must be some knowledge that the act is wrongful in order for the conduct to be considered willful, however, Chief Justice Robert Wilentz writing for the majority, observed that “**Like many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use.**” Chief Justice Wilentz goes on to observe that the meaning may also differ depending on the common-law rule or the statute to which it is relevant, and perhaps even differently within such rule or statute depending on the facts. Other courts have had an opportunity to explore the definition of “knowing and willful” and have concluded that the words do not have a single, fixed or uniform meaning. Their meanings, moreover, will often vary depending on the context in which used or the offense charged *Carmody v. Rhode Island Conflict of Interest Commission 509 A.2nd 453, (S.Ct. 1986)*.

Admittedly, many of the provisions of OPRA are not shining examples of clarity, however, the Act does contain certain mandates which are clear, unambiguous, explicit and direct. Some provisions clearly require an official to take specific action, while others prohibit certain actions. Although it is my opinion that a “specific intent” hearing to prove whether or not an official actually had a specific intent to violate the statutory

mandate is not required when the mandate is clear and explicit, I do agree that if the mandate is confusing, unclear or reasonably susceptible to different interpretations, a hearing is in order to determine an official's intent.

OPRA is acclaimed by many to be one of the most serious public access laws in the United States. I agree with this appraisal, and I am convinced that our Legislature intended to set the tone with respect to public access of government records in New Jersey. Although I agree that it was not the Legislature's intent to impose strict liability on officials who unwittingly violate OPRA, I believe the Legislature has given the Council and our Courts sufficient latitude to find that in those cases where the mandate was clear, unambiguous explicit and plain, a hearing to prove that the official did not intend to violate those mandates is not required."

A discussion then ensued.

Mr. Maltese addressed responses to proposed custodian consequence policies and proposed that the comment period be extended, by consensus until November 3, 2003. Mr. Dice will update the GRC web page and send notice of the extension through the GRC list-serve.

The cases on the agenda were then addressed.

Jackson vs. Kean University (2002-89)

Mr. Dice reviewed the facts of the case and informed the Council that the Division of Law asked for additional time to do more legal research. The complaint was removed from the agenda for the October 9, 2003 Council meeting.

Mr. Maltese asked if the case would be ready for next month's Council meeting.

Spielholz vs. Township of West Orange (2003-88)

Mr. Dice outlined the issues in the complaint and recommended that the Council:

- Dismiss the complaint.
- Find that the custodian provided access to the video tapes in a timely manner
- Find that the \$15 per tape copy charge is reasonable and permitted pursuant to N.J.S.A 47:1A-5.
- Dismiss the allegations of video tampering

Mr. Monzo moved to accept the Acting Executive Director's recommendations, seconded by Mr. Spigner. The motion was adopted by roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schoyners, Mr. Spigner and Mr. Maltese

Nays: None

Shain vs. Lakewood Township (2002-111)

The case was continued from the August 14, 2003 meeting based on Council's need for advice from the Office of the Attorney General on what constitutes a knowing and willful violation. Mr. Dice provided an overview of the case.

Conversation followed.

Mr. Maltese confirmed that the access portion of the complaint is dismissed and that the Council finds that the custodian did violate OPRA because documentation was not provided within the seven business days.

Mr. Maltese proposed that a penalty of \$1,000 be imposed on the custodian pursuant to N.J.S.A. 47:1A-11a. The penalty is imposed because the custodian knowingly and willfully committed a violation of OPRA.

A conversation ensued.

Deputy Attorney General, Barbara Conklin advised the Council that if they believe that a custodian knowingly and willfully violated OPRA, that custodian must be given the opportunity to defend themselves.

A motion as follows was made by Mr. Spigner and seconded by Mr. Maltese:

- The records custodian, Bernadette Standowski, violated OPRA by providing access to the government records sought approximately five months after the OPRA request was received;
- The custodian knowingly and willfully denied access to the requested government records;
- The denial of access was unreasonable under the totality of the circumstances;
- The custodian is fined \$1,000.00 pursuant to N.J.S.A. 47:1A-7(e) and N.J.S.A. 47:1A-11.

Deputy Attorney General, Barbara Conklin stated that the motion is contrary to the legal advice she has provided.

The motion was passed on a roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schoyners, Mr. Spigner and Mr. Maltese.

Nays: None

Mr. Maltese directed Mr. Dice to issue the order to the custodian.

Blanchard vs. Rahway Board of Education (2003-57)

Mr. Dice provided an overview of the case:

- The Council first considered this case at the August 14, 2003 meeting, but it was continued based on Council's need for advice from the OAG.
- Denial of immediate access to the employment contract of the school superintendent.
- Denial of access to audiotapes of a public meeting.
- Dismiss the denial of access complaint because the requestor ultimately received the contracts. This was decided at the August Council meeting.

Mr. Maltese advised the Council that they are discussing the application of a penalty for the custodian, and asked for a motion to dismiss the portion of the complaint to fine the attorney. Mr. Monzo offered a motion as stated by Mr. Maltese. It was seconded by Mr. Spigner and approved on roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schoyner, Mr. Spigner and Mr. Maltese.

Nays: None

Mr. Maltese opened a discussion to determine if the custodian in this complaint should be fined. A discussion regarding the custodian's actions ensued.

Mr. Maltese asked for a motion regarding a fine in this case. Mr. Spigner offered a motion to not fine the custodian as the custodian had not violated OPRA in the totality of the circumstances. It was seconded by Ms. Hook and adopted on roll call:

Ayes: Ms. Hook, Mr. Monzo, Ms. Schoyner, Mr. Spigner and Mr. Maltese.

Nays: None

Mr. Maltese then asked if there was any new business.

Mr. Maltese opened the floor to public comment.

Kerri Blanchard of Rahway, addressed the Council regarding her complaint. She stated that the facts as discussed are incorrect. The information she requested was given to her a month and a half after she requested it, not two weeks. Ms. Blanchard expressed her dissatisfaction with her case. She stated that there is no recourse for the public and that the Council does not want the public to have access to records.

Elise Bokekio of Rahway addressed the Council stating that she was generally pleased with its actions. She also discussed the circumstances in the Kerri Blanchard case.

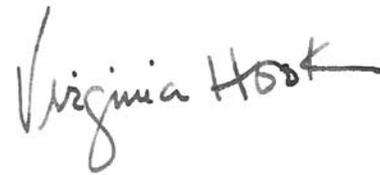
Albin Wagner, Chief of the Bureau Records Management, Division of Archives and Records Management addressed the Council regarding the physical location of records. Mr. Wagner states that there are guidelines about record retention schedules and guidelines about leave of absence records and other time records.

Hearing no more public comment, Mr. Maltese called for a motion to close the public portion, and a motion to adjourn at 12:20 p.m. The motion was offered by consensus and approved by roll call:

Ayes: Ms. Hook, Ms. Schoyner, Mr. Spigner and Mr. Maltese

Nays: None

Respectfully submitted,

A handwritten signature in black ink that reads "Virginia Hook". The signature is written in a cursive style with a horizontal line at the end.

Virginia Hook, Secretary
Government Records Council